

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Docket No. FIFRA-08-2004-0005

IN THE MATTER OF:

**Fremont County Weed and Pest
Control District
Fremont County Courthouse
450 N. 2nd, Room 315
Lander, WY 82520**

Respondent.

**COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

COMPLAINT

This civil administrative action is instituted pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) by Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or "the act"), 7 U.S.C. Section 136l(a). Complainants are supervisors in the Legal Enforcement Program and the Technical Enforcement Program within the Office of Enforcement, Compliance and Environmental Justice, Region 8, EPA, who have been duly authorized to institute this action. This proceeding is subject to EPA's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. part 22 ("Consolidated Rules of Practice").

DEFINITIONS

1. ***Pesticide*** is defined by 40 C.F.R. § 152.3(s) as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, or intended for use as a plant regulator, defoliant, or desiccant”
2. ***Certification*** is defined by 40 C.F.R. § 171.2(a)(7) as " . . . recognition by a certifying agency that a person is competent and thus authorized to use or supervise the use of restricted use pesticides."
3. ***Certified Applicator*** is defined by 40 C.F.R. § 171.2(a)(8) as "any individual who is certified to use or supervise the use of any restricted use pesticide covered by his certification."
4. ***Uncertified Person*** is defined by 40 C.F.R. § 171.2(b)(4) as “any person who is not holding a currently valid certification document indicating that he is certified under section 4 of FIFRA in the category of the restricted use pesticide made available for use.”
5. ***Restricted Use Pesticide*** is defined by 40 C.F.R. § 171.2(a)(23) as "a pesticide that is classified for restricted use under the provisions of section 3(d)(1)(C) of the Act."
6. ***Make Available for Use*** is defined by 40 C.F.R. § 171.2(b)(2) as “to distribute, sell, ship, deliver for shipment, or receive and (having so received) deliver, to any person. However, the term excludes transactions solely between persons who are pesticide producers, registrants, wholesalers, or retail sellers, acting only in those capacities.”
7. ***Dealership*** is defined by 40 C.F.R. § 171.2(b)(3) as “any site owned or operated by a restricted use pesticide retail dealer where any restricted use pesticide is made available for use, or where the dealer offers to make available for use any such pesticide.”

8. ***To Distribute or Sell*** and other grammatical variations of the term such as “distributed or sold” and “distribution or sale,” is defined by 40 C.F.R. § 152.3(j) as “the acts of distributing, selling, offering for sale, holding for sale, shipping holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any State.”

GENERAL ALLEGATIONS

9. EPA has jurisdiction over this matter pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. Section 136l(a)(1).
10. Respondent, Fremont County Weed and Pest Control District, is a "person" within the meaning of Section 2(s) of FIFRA, 7 U.S.C. Section 136(s), and is therefore subject to regulation.
11. Section 25(a)(1) of FIFRA, 7 U.S.C. § 136w(a)(1), provides authority for the promulgation of regulations to carry out the terms and provisions of FIFRA. In accordance with that authority, EPA has promulgated and published regulations which appear at 40 C.F.R. parts 150 through 186.
12. Respondent operates a weed and pest control district in Wyoming’s Fremont County.
13. Respondent sells pesticides and does some pesticide applications to roadsides, rights of way, and limited field spraying.
14. The EPA Region 8 Office has the authority to take enforcement actions, pursuant to FIFRA enforcement authorities, See, 40 C.F.R. section 171.11, in the State of Wyoming because the State of Wyoming has not been delegated primacy for FIFRA enforcement matters.

COUNT 1
(Sale of a Restricted Use Pesticide to a Non-Certified Applicator)

15. Paragraphs one through fourteen of the general allegations are incorporated by this reference and set out as if fully stated herein.
16. Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), states "[i]t shall be unlawful for any person . . . to distribute or sell, or to make available for use . . . any registered pesticide classified for restricted use for some or all purposes other than in accordance with section 136a(d) of this title and any regulation thereunder"
17. Section 3(d)(1)(C)(i) of FIFRA, 7 U.S.C. § 136a(d)(1)(C)(i), states "[i]f the [EPA] classifies a pesticide . . . for restricted use [a RUP] because of a determination that . . . the pesticide presents a hazard to the applicator or other persons, the pesticide shall be applied . . . by or under the direct supervision of a certified applicator."
18. On or about June 4, 2003, Respondent sold the restricted use pesticide Tordon 22K (EPA Registration Number: 62719-16), to a Mr. James Sloan at its dealership. The invoice issued by Respondent associated with this transaction is Number 8853-9.
19. On or about June 4, 2003, Mr. James Sloan was not a certified private applicator in Wyoming.
20. Tordon 22K is restricted for use by applicators who are certified. Furthermore, Tordon 22K may be sold only to certified applicators, or to uncertified applicators *provided* the conditions at 40 CFR section 171.11 (g)(ii) are satisfied.

21. The act of distributing or selling Tordon 22K, a RUP, to a person who is not a certified private applicator or who does not meet the conditions set out in 40 CFR section 171.11(g)(ii), is a violation of Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F).

PROPOSED CIVIL PENALTY

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1) and 40 C.F.R. Part 19, authorizes the assessment of a civil penalty of up to \$5,500.00 for each day of each violation of FIFRA.

Agency policy with respect to assessment of civil penalties under FIFRA is governed by EPA's

Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act

(FIFRA), July 2, 1990, which provides a rational and consistent method for applying the statutory penalty factors to the circumstances of specific cases. A copy is enclosed as Complainant's Ex.

1.

In arriving at the assessment of the penalty specified below, EPA, as required by section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), has taken into consideration the following, as known to Complainant at this time:

- The size of Respondent's business;
- Respondent's ability to continue in business in light of the proposed penalty; and
- The gravity of the alleged violation(s).

The reasoning behind the proposed penalty in this matter is detailed in the penalty calculation worksheets and accompanying narrative, incorporated herein by reference and enclosed as Complainant's Ex. 2.

Based on the above considerations, EPA proposes to assess the following civil penalty for each of the violations described above:

COUNT I	\$ <u>4,400</u>
TOTAL PROPOSED PENALTY	\$ 4,400

TERMS OF PAYMENT

If you do not contest the findings and assessments set out above, payment of the penalty for the violations may be forwarded to EPA. Payment must be made, within (thirty) 30 calendar days of receipt of this complaint, by sending a certified or cashier's check payable to "Treasurer, United States of America," in care of:

U. S. EPA, Region 8
(Regional Hearing Clerk)
Mellon Bank
P. O. Box 360859M
Pittsburgh, PA 15251

A copy of the check must be mailed simultaneously to the attorney listed below.

Payment of the penalty in this manner shall constitute consent by the Respondent to the assessment of the penalty and a waiver of the Respondent's right to a hearing on this matter.

NOTICE OF OPPORTUNITY FOR HEARING

This administrative civil penalty proceeding will be conducted pursuant to the Consolidated Rules of Practice, 40 C.F.R. part 22, a copy of which is enclosed with this complaint. Pursuant to these rules, you have the right to request a hearing to contest any factual allegation set forth in the complaint or the propriety of the proposed penalty. If you (1) wish to contest the factual claims made in this Complaint; (2) wish to contest the propriety of the proposed penalty; or (3) believe that you are entitled to judgment as a matter of law, you must file a written answer and a copy within thirty

(30) days after this Complaint is served. Should you choose to contest any aspect of this Complaint your answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint; (2) briefly state all facts and circumstances, if any, which constitute grounds for a defense; (3) state the facts which you dispute; and (4) specifically request an administrative hearing, if desired. Failure to deny any of the factual allegations in the Complaint will constitute an admission of the undenied allegations. The Answer and a copy shall be sent to the EPA Region 8 Hearing Clerk, 999 - 18th Street, Suite 300, Denver, Colorado 80202-2466. Please send a copy of the Answer and all other documents which you file in this action to the attorney noted below.

IF YOU FAIL TO REQUEST A HEARING, YOU WILL WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER WITHIN THE THIRTY (30) CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

You are further informed that the Consolidated Rules of Practice prohibit any *ex parte* (unilateral) discussion of the merits of any action with the Regional Administrator, Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case.

SETTLEMENT CONFERENCE

EPA encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement as a result of an informal conference. Therefore, whether or not you request a hearing, you may confer informally with the Agency concerning (1) whether the alleged violations in fact

occurred as set forth above, or (2) the propriety of the proposed penalty in relation to the size of your operation, the gravity of the violation, and the effect of the proposed penalty on your ability to continue in business. The request for an informal conference does not stay the running of the thirty (30) day time period for requesting a hearing and filing an answer.

To explore the possibility of settlement in this matter or if you have questions, please contact the attorney listed below.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION VIII,
OFFICE OF ENFORCEMENT, COMPLIANCE,
AND ENVIRONMENTAL JUSTICE,

Complainant.

Date: 2nd June 2004

By: David J. Janik

Michael T. Risner, Director

David J. Janik, Supervisory Enforcement Attorney
Legal Enforcement Program

Date: June 2, 2004

By: SIGNED

Elisabeth Evans, Director

Technical Enforcement Program

Date: June 1st 2004

By: SIGNED

Dana J. Stotsky

Senior Enforcement Attorney

Legal Enforcement Program

Colorado Bar # 14717

Phone: (303)-312-6905

FAX: (303) 312-6953

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Docket No: FIFRA-08-2004-0005

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT, AND NOTICE OF OPPORTUNITY FOR HEARING with Exhibits were hand-carried to the Regional Hearing Clerk, EPA Region 8, 999 18th Street, Denver, Colorado, and that a true copy of the same was sent certified mail to:

John L. "Lars" Baker, Supervisor
Registered Agent for
Fremont County Weed and Pest
Control District
Fremont County Courthouse
450 N. 2nd, Room 315
Lander, WY 82520

June 7, 2004_____
Date

Judith M. McTernan_____

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE
REGIONAL HEARING CLERK.**

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JUNE 7, 2004.